

IN THE SENATE OF THE UNITED STATES.

APRIL 14, 1880.—Ordered to be printed.

Mr. HOAR, from the Committee on Claims, submitted the following

REPORT:

[To accompany bill H. R. 2262.]

*The Committee on Claims, to whom was referred the memorial of Juliet Leef, and also the bill (H. R. 2262) providing for the relief prayed for in said memorial, have considered the same and report :*

The facts of the case we believe to be, in substance, as stated by the minority of the committee. Upon the facts the question arises whether it is the duty of the United States to compensate citizens for injuries to their property or business caused by the improper exercise of his powers by a consul of the United States. We do not think it is the duty of the government to make such compensation, whether the consul acted conscientiously and erred in a doubtful case, or whether his actions were arbitrary and wanton. We can see no reason why, if this claim be allowed, the government ought not to compensate persons for illegal arrests, wrongful judgments of courts, wrongful acts of military or naval officers in war, and all cases where public authority has been abused. We do not think such a precedent ought to be established. Government acts through human and imperfect agents. The liability to suffer from their error is one of the unavoidable ills of life. We recommend that the prayer of the petition be disallowed, and the bill indefinitely postponed.

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All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Representatives and direct Taxes shall be apportioned among the several States which may be admitted into or excluded from this Union according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including all bound Persons for Service or Labor, and all Indians taxed as free Persons, three fifths of all other Persons, not Indians, bound to Service or Labor in the said State, Territory or Possession: but no Representative shall be chosen from any State until such Time as the Number of free Persons therein shall be equal to the Number of free Persons in the least State.

And the Electors in each State shall have the Qualifications requisite for Electors in the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not, when elected, have seven Years since he last attained to the Age of twenty one Years, and seven Years since he last became a Citizen of the United States, and who shall not, when elected, have been seven Years since he last attained to the Age of twenty one Years, and seven Years since he last became a Citizen of the United States, and who shall not, when elected, have been seven Years since he last attained to the Age of twenty one Years, and seven Years since he last became a Citizen of the United States.

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APRIL 14, 1880.—Ordered to be printed.

Mr. PRYOR, from the Committee on Claims, submitted the following  
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VIEWS OF THE MINORITY:

[To accompany bill H. R. 2262.]

*The undersigned, a minority of the Committee on Claims, to whom was referred the bill (H. R. 2262) based upon the memorial of Juliet Leef, the widow of Henry Leef, deceased, in her own behalf and for the children (ten in number) and heirs of the said Henry Leef, deceased, asking for the settlement and payment of his claim for losses and damages sustained in consequence of the alleged illegal seizure, in the lifetime of the said Henry Leef, of that certain bark Mary Teresa, the property of him, the said Henry Leef, by Alexander H. Tyler, consul of the United States at Bahia, Brazil, submit the following as their views:*

That the history and character of this claim, as appears from the memorial and papers accompanying the same, are as follows, viz:

That this same bark, Mary Teresa, was a vessel of foreign build, having been built in Bordeaux in the year 1835, and was navigated as a French vessel under the name of Veloz Manuela, by B. C. Collos, master, &c., and while bearing the name of Veloz Manuela, and mastered by B. C. Collos, and navigated as a French bark or vessel on a voyage from Philadelphia, Pa., to Baltimore, Md., in the United States, she sustained very considerable damage in the hull and loss of spars, sails, and rigging; so much so that, after a careful survey and examination by competent surveyors, &c., she was condemned as unseaworthy, and by them directed to be sold for account of whom it might concern; which was accordingly done at public auction, in the said city of Baltimore, on the 23d day of June, 1847, by Robert R. Lenmons & Co., duly commissioned and qualified auctioneers in said city, and by and with the consent and approval of the French consul at Philadelphia and B. C. Collos, master, &c.; that at said public sale of the said French bark Veloz Manuela, of Bordeaux, Joseph Daiger, jr., being the highest and last bidder, became the purchaser for the consideration and sum of \$950; upon the payment of which said sum the said bark Veloz Manuela was delivered to the said Daiger, jr., a citizen of the United States, together with a bill of sale from the said Collos, duly executed, delivered, and acknowledged on the said 23d day of June, 1847; all of which will more fully appear from a copy of the minutes of the French consul at Baltimore and the bill of sale of the said Collos, master, &c., and with the papers marked S; that the said Joseph Daiger, jr., the purchaser aforesaid, and sole owner of the said French bark or

vessel called Veloz Manuela, of the burthen of two hundred and two <sup>85</sup>/<sub>100</sub> French tons, in consideration of the sum of fifteen hundred dollars, lawful money of the United States, to him in hand paid on 19th day of July, 1847, by bill of sale in writing, sold and conveyed the said bark Veloz Manuela to Henry Leef, in his lifetime, but since deceased, at the time a citizen of the city of Baltimore, in the State of Maryland; and the said bill of sale was duly and properly executed and acknowledged by the said Daiger, and delivered to the said Leef; that the said Daiger and Leef were both shown in and upon the said bill of sale of Daiger to Leef to be citizens of the United States, as it will fully appear by reference thereto, for this and all needful purposes of this report, said bill of sale being marked D and S, and with the papers.

It appears from a letter of Robert J. Walker, then the Secretary of the Treasury of the United States, bearing date the 15th day of July, 1847, being a point of time between the sale of the French bark Veloz Manuela to Joseph Daiger, jr., and the sale of the same vessel by said Daiger to the said Henry Leef, that he, the said Leef, as it is fair to presume, looking to the purchase, navigation, and resale of the said vessel, but dependent upon the fact whether the same could be navigated and sent to a foreign port for sale, addressing a letter of inquiry to Secretary Walker, in substance (as quoted by him, Walker in speaking of the said vessel Veloz Manuela) as follows:

What documents is she entitled to as the property of an American citizen, to represent her in a foreign port, and in the absence of a *register*? What claim would she have on the respect of foreign governments, and on the *protection* of the *representatives* of the United States Government in foreign ports? Also, on what terms merchandise can be imported into the United States by her?

In reply, Secretary Walker said:

I have to inform you that this being a foreign built vessel she cannot receive papers of any description *under* the *register* or licensing laws of the United States, as the fact of her being at this time the property of a citizen of the United States gives her no American character under the laws referred to. As to her treatment in foreign ports, the consul of the country presiding at your port, to which it is proposed to send her, can doubtless afford you information on this point. If this vessel enters any port in the United States coming from a foreign port, without having papers issued by some foreign government whose vessels are placed on equal footing by law or treaty with vessels of the United States, said vessel would be liable to the payment of discriminating duties on her tonnage and cargo.

All of which appear in said letter of said Secretary, marked Walker, and here referred to.

It seems from the papers on file with this application to Congress for settlement and payment, that in this character of vessel and ownership, the owner wishing to send her to a foreign port for sale, that while he cannot have her registered or licensed, yet the owner may apply to the collector of customs at the port where the vessel is, and upon his (own) request the said collector shall record the bill of sale in the books of the custom-house, and indorse the fact upon the bill of sale and return the same to the owner, which, when done, is *prima facie* evidence of the ownership and nationality of the vessel, and entitled her to bear the flag and receive the protection of the United States, which appears to have been done in this case; but that the right of such vessel to engage in foreign waters depends on the *lex loci* which from the papers the said Leef had obtained from the Brazilian consul at Baltimore and Brazilian ports the proper papers or documents to do so. Thus it appears the said Leef, before the date of his bill of sale of the said bark Veloz Manuela, had taken the precaution to ascertain those facts, and, as it is fair to presume, acted upon them, and so relying, purchased the



said French bark, repaired her at considerable cost and expense with the view of sending her to foreign ports for sale, and also, by the permission of foreign consuls, to send her into their waters and ports with certain articles of trade.

To this end, after the necessary repairs being done and the said vessel rendered seaworthy, the said Leef entered into shipping articles with J. M. Cook as captain, and William J. Woodly and others as crew of said vessel or bark, by dropping the name of Volez Manuela and taking the name of Mary Teresa, of Baltimore, which will appear from said agreement, dated August the 16th to the 25th, 1847, which said articles are here referred to and marked E. The said vessel Mary Teresa, formerly Veloz Manuela, having placed certain cargoes on board at the port of Baltimore, her captain and master, the said J. M. Cook, delivered and placed with the collector of the district of Baltimore a report and manifest of the cargo at said port of Baltimore on board, and bound from said port of Baltimore to Port Walthall, Va., bearing date the 27th day of August, 1847, as appears from manifest marked M, which is here referred to. That on the 30th day of August, 1847, to the end of selling said bark Mary Teresa and her cargo, and in all things control and dispose of the same, the said Henry Leef, by his power of attorney in writing of that date, constituted and appointed one John McKee supercargo thereof, and placed him in charge of the said bark and cargo, which will more fully appear from said power of attorney with American and Brazilian certificates, and here referred to and marked P. That, being thus purchased, recorded, indorsed, reported, refitted, laden, officered, and manned, the said Mary Teresa regularly cleared for the port at Richmond, Va., and there taking on a further cargo of flour, cleared said port of Richmond, Va., on the 9th day of September, 1847, and bound for Pernambuco, as appears from the certificates of the collector at that port (Richmond) and the Brazilian consul at Richmond, Va., and marked A and B. Under these proceedings the said Mary Teresa, navigated by said captain and crew, reached Pernambuco safely and unmolested on the 16th November, 1847, and was certified by the United States consul at that port that the said vessel Mary Teresa was navigated according to the laws of the United States, as appears from his certificate of that date, and with the papers, marked C and here referred to. Also the certificate of the American consul at the port of Pernambuco that Henry Leef was the owner of said vessel, bearing date 16th November, 1847, which is likewise referred to and marked L.

Failing to dispose of said vessel and all of her cargo at Pernambuco, she cleared said port for Bahia, as a better market on the 17th day of November, 1847, as will appear from the certificate of the collector of that port, and of that date, and with the papers, and marked F and here referred to.

Upon the said Mary Teresa reaching the port of Bahia, which was between the 16th of November, the day she cleared the port of Pernambuco and the 24th day of November, 1847, to wit, on the 21st November, 1847, and reporting her arrival to the American consul, Alexander H. Tyler, at that port, and furnishing him, the said Tyler, as such consul, with her navigating papers from and inclusive of those from the ports of Baltimore, Richmond, and Pernambuco, and including bill of sale with indorsements, and all the papers of the captain, crew, and supercargo, manifests, clearances, &c., he, the said Tyler, consul aforesaid, then and there, instead of offering the said Mary Teresa, her owner, supercargo, captain, crew, and cargo, the protection to which she was entitled under the laws and flag of the

United States, which was his duty to do, seized said vessel, Mary Teresa, and took coercive possession of said vessel and cargo, declaring that she, the said Mary Teresa, should have been furnished with an American register and certified crew list; and in the absence of those papers, he, the said Tyler, pronounced her, the said Mary Teresa, to be confiscated to the Government of the United States, and this done by him as the consul of and in the name and for the use of the United States, demanding, taking, and receiving, and possessing himself with all the papers and documents of, belonging to, and concerning the said vessel, owner, captain, crew, and supercargo, and cargo; all and more of which will appear in the papers herewith filed, and here referred to and marked G, being a list of some of the papers and documents belonging to said vessel, and dated 24th November, 1847.

It appears that the supercargo had sold upon reaching or while at Bahia the said bark Mary Teresa to a citizen of Montevideo, and that the consul residing at Bahia had received orders from the minister of his government, residing at Rio de Janeiro, to give her the flag of that country, whereupon the said Tyler, as consul aforesaid, intercepted and prevented the consummation of said sale by notifying the consul at Bahia that the vessel Mary Teresa could not be sold or otherwise disposed of without presenting a paper from *him dated after that date*, as will appear from his letter to said consul, dated 24th of December, 1847, marked T, and here referred to.

The said Tyler, consul as aforesaid, on the 3d of December, 1847, wrote to David Tod, minister at Rio de Janeiro, for suggestion and advice as to his conduct in the matter of the Mary Teresa, stating that the supercargo wished to carry said vessel to that port. Minister Tod, by letter dated the 11th of December, 1847, informed the said Tyler that the case was new to him, but that he would examine the matter, but advised the said Tyler to suffer the vessel to come on to that port, Rio de Janeiro, and that he (Tod) would confer with the consul at that port as to the proper course to pursue with said vessel.

On the 19th January, 1848, John McKee, supercargo, addressed a letter to the said Tyler, in which is recited the facts and circumstances of the seizure of the vessel and the conduct of the said Tyler, as consul of the United States, and that he had *abandoned* said vessel to him as such consul, with notification that he, owner, and crew *protested against his (Tyler's) action* in the premises as the representative of the United States, with notification of a claim of thirty thousand dollars accruing to those concerned in said vessel and cargo, furnishing therewith an inventory of the stores, furniture, and appurtenances. On the 19th day of February, 1848, the said Tyler, as consul aforesaid, dispatched said vessel Mary Teresa, under a new captain and crew, together with documents taken and received from the said bark Mary Teresa, at Bahia, to Rio de Janeiro, to minister Tod, reciting in his letter accompanying said vessel the personal insults and difficulties, involving life and limb with those in charge of the bark Mary Teresa, at Bahia, in consequence of his seizure and conduct in the premises; all of which and more will appear from his (Tyler's) letter of that date and here referred to.

The said vessel, under the charge of Captain Howard and crew, reached the port of Rio de Janeiro on the 29th day of February, 1848, and David Tod, minister at that port, by letter of date 9th of March, 1848, gives it as his opinion that Tyler, consul as aforesaid, had erred; that the papers were sufficient to entitle the vessel Mary Teresa to bear the American flag, and that he should not have compelled her to haul it down;

that he (Tod) had turned the vessel over to one Mr. Parks; that he (Tyler) should not have sent her to Rio de Janeiro against the objections of the supercargo; that his suggestion was based upon the idea that the supercargo wished it, and that if when he changed his purpose or desire, that he (Tyler) knowing or having reasons to know it was so based, should not have sent the vessel to Rio de Janeiro; that the vessel would have to be sent to the United States in ballast; that great expense would attend the same, and the vessel was of less value in the United States than Rio de Janeiro, and no one to hypothecate the vessel for funds to transport her, &c.; which letter is here referred to.

From a letter of James Buchanan, of the Department of State, dated June 3, 1848, it appears that Tyler, consul as aforesaid, wrote a letter of inquiry inclosing copies of all the papers of the Mary Teresa, dated 9th of April, 1848, and asking for instructions and advice touching his seizure of the Mary Teresa. Mr. Buchanan, in reply, says:

*The department is satisfied, although his vessel, without being so entitled, bore the American flag, and that no legal proceedings can properly be instituted against her," &c.*

He informs the said Tyler, as consul, that the vessel Mary Teresa had been taken by Captain Howard to the port of Philadelphia, and that he (Buchanan) in reply to a letter of the district attorney at that place, and that instructions to the same effect were given to him by the Treasury Department, and he was directed *abstain from taking any steps in the case*; which letter is likewise here referred to. The letter of the Treasury Department referred to is that of McC. Young, Assistant Treasurer, dated May 31, 1848.

R. J. Walker, Secretary of the Treasury, by his letter of date June 5, 1848, in answer to one from James Page, collector of customs at Philadelphia, of date June 2, 1848, says:

*That the bark Mary Teresa was improperly taken possession of and sent to the United States by Tyler, consul aforesaid at Bahia, contrary to the wishes of her owner, and that the acts of the consul are explicitly disavowed by the government; that the arrival of said vessel at that port is not to be treated as voluntary so as to subject the said vessel to alien duties, and to allow the said vessel to come to entry free of any charge for tonnage and to take a clearance for Baltimore.*

Which is here referred to.

The letter of Mr. Buchanan from the Department of State, dated July 1848, to Henry Leef, shows he had caused the original papers of the said Mary Teresa, as per list attached, to be delivered to Hon. Robert M. McLane for transmission to him. On the 14th day of February, 1848, the said Alex. H. Tyler, as consul of the United States at Bahia, summoned and procured, at his own instance, Joseph Swift, in conjunction with two other American ship-masters, to examine and value the bark Mary Teresa, of Baltimore, and that said valuers placed the value of said bark at *fifteen thousand* silver dollars, while said vessel lay at anchor in the said port of Bahia; also their certificates to an inventory of articles attached to her at the time; which are here referred to and marked H. The said John McKee, supercargo of the said Mary Teresa, on the 7th of February, 1848, propounded his individual claim for damages and losses to the said Tyler as consul aforesaid, growing out of and in consequence of his seizure of said vessel, estimated at five thousand dollars which is likewise referred to, also his account rendered and dated at Baltimore, 1st December, 1848, for three thousand three hundred dollars, and marked R and G, and here referred to.

By the affidavit of John McKee, dated the 7th day of January, 1873, the following facts are deposed to by him: That he was the supercargo of the bark Mary Teresa, owned by Henry Leef, of Baltimore,

Md., when that vessel was taken possession of by Alexander H. Tyler, United States consul at the port of Bahia, Brazil; that as soon as the act of the said consul in seizing her was disavowed by the Government of the United States, the collector of the port of Philadelphia delivered to him, as the agent for the owners, the said bark Mary Teresa, which he dispatched to the port of Baltimore; that soon after her arrival at Baltimore she was duly advertised in the public newspapers for sale at auction, and was actually sold at public auction by a regular licensed auctioneer; that there were competitors at the sale; that the business firm of Nathan, Rogers & Company were the highest bidders; that they became the owners, and that afterwards, on their application to Congress, a special act was passed granting them an American register for the said bark Mary Teresa, under which she was navigated for several years; that after such sale at auction, the said Henry Leef had no interest whatever, direct or indirect, in said bark, as will appear from said affidavit with the papers, and here referred to and marked Z; that the bark Mary Teresa sold, as shown by the sworn statement of Henry Leef, at public auction for twenty five hundred dollars.

The account sworn to and filed with the papers, and marked H and L, for damages and losses on account of the seizure of the bark Mary Teresa by the said Tyler, as consul and the representative of the United States at the port of Bahia, Brazil, amounts in the aggregate to twenty-three thousand and thirty-six dollars, and itemized as shown in said account stated, which is here referred to for all needful purposes.

This brings us now to the final question, viz: From these facts, should Congress grant the relief prayed for by the memorialist? In answering this, the minority of the committee fully recognize the principle and rule of law which has long existed and now exists, that the government is not legally a guarantor and insurer, and cannot be made liable for the tortious acts of its officers and agents in any of the courts of the country, and that this rule applies to courts of law, equity, and the Court of Claims, as it heretofore and now exists, and that neither have now, or heretofore have had, jurisdiction to hear and determine questions of such a character, and the reason assigned for so holding and withholding rests upon the grounds as declared, both by the text-writers and decisions of the courts, that if the government could be held responsible, and made liable in the courts for the wrongful and tortious acts of its officers and agents, without instructions to do the wrong complained of, the result would be to involve the government beyond measure, subject it to the frauds and uncontrollable acts of its officers, and be in every way contrary to safe and sound policy.

But while such is the rule, yet in a proper case the government has provided and afforded relief when its officers or agents do, or cause to be done, wrongful acts injurious to others, and that remedy rests in and with Congress—not a remedy that can be compelled by the injured party, but one entirely voluntarily, resting, as it does, in the sound discretion of Congress, to be conscientiously exercised. And this minority of the committee hold that the very fact that the injured party has no rights in the courts, and for wise and proper reasons withhold from them, yet that should not prevent, hinder, and delay or prejudice the claim or claimant, but be a greater reason for the exercise of a just discretion, and because the party has to rely alone on that discretion, provided the case is made out to the satisfaction of the legislative department of the government, sound policy on the one hand, to prevent frauds and evolvments—as the denial of the courts and liability—while on the



other it is but justice and equity, by the exercise of a sound legislative discretion. Otherwise the operation and effects growing out of a government would be worse than, or as bad as, no government; yea, rather oppressive and injurious, than a protection to them for whose benefit it was established. That Congress has authority to afford relief in a proper case cannot be denied, either as a matter of justice or precedent.

In the case of *Gibbons vs. United States* (8 Wallace, U. S. Rep., page 269), in the last lines of that opinion, after repeating the rules of law, that the government cannot be liable in the courts of the country, &c., concludes by saying the party's remedy and relief are in Congress.

July 11, 1848, the House Committee of Claims, in this very case, addressed a letter to Mr. Buchanan, Secretary of State, as to the liability of this government to Henry Leef. In reply, Mr. Buchanan asserted that there was no *legal* responsibility on the government for the wrongful acts of its officers, for the reason heretofore mentioned; and he says that while such is undoubtedly the general rule, but *very strong and peculiar* cases may present exceptions. "It is, however," said he, "for the legislative branch of the government to decide, in its *discretion*, whether, under all the circumstances, the case of Henry Leef be of this character"; which will appear from his letter of that date, and with the papers, marked X and here referred to.

As regards precedents, there are many by the Congress of the United States, and, applying the language of Mr. Eustis and others, from the Committee of Claims, touching this case at various times, in which he and they say: "The committee have examined a large number of cases in which the government has *acknowledged* its liability in *analogous* cases, and select the following cases as conclusive:

"March 31, 1814. Act to reimburse Samuel Ellis, marshal of Maine, amount of judgment recovered against him for seizing certain flour.

"February 27, 1815 Act to reimburse Joshua Sands, collector at New York, amount of judgment recovered against him for seizing certain vessels.

"May 19, 1824. Act to reimburse Archibald Clark, collector at St. Mary's, amount of judgment recovered against him for *detaining ship Apollo*.

"July 14, 1832. Act to pay the amount of certain judgments recovered against marshal for the district of Pennsylvania, for *seizing certain teas*, to the parties interested therein.

"March 2, 1833. Act to reimburse Cyrenius Hall, collector at Sandusky, amount of judgment recovered against him for seizing a vessel.

"June 30, 1834. Act to reimburse W. C. H. Waddell amount of judgment recovered against him for seizing the ship *American Eagle*."

Now, there has been no change in the law of discretion and justice due from Congress to the citizen then and now. The power that it had then and the same moral obligation rest on Congress to do equity now that it did then, in like and especially in stronger cases calling for the exercise of that just and equitable discretion.

To this and these cases it may be said and replied:

1. That those are cases where the party damaged had first exhausted his remedies at law against the officer doing the wrong, without obtaining satisfaction against the wrong-doer from any cause, whether insolvency or otherwise. Now, this does not meet the reason or justice of the rule that requires Congress to hear and determine and afford compensation for the wrong done by its officers.

The remedy and reason does not depend, so far as the government is concerned, upon the liability of its officer to answer in judgment, or



that suit shall be prosecuted to judgment to ascertain whether the officer was a wrong-doer or is able to respond in damages out of his individual and personal estate, but upon the grounds that it has done the wrong through its agent; *qui facit per alium, facit per se*; that having the sole power to *appoint*, and alone the party to determine *fitness* and *responsibility*, assumes the responsibility in *special* and *exceptional* cases; not only that, but if the case presented is of that character which, if prosecuted to judgment, would plainly and necessarily result in a personal judgment, then, in the estimation of Congress, that character of case the government considers that *rightly* done which could be certainly *well* done. And as to the solvency of the officer, it has indemnified and protected itself by sufficient bonds and bondsmen, which alone it determines, and with which the damaged party has no say, connection, or interest; a bond which alone inures to and for the benefit of the government, and to which the injured party is neither party or privy, and upon which he, the damaged party, could not have or maintain a suit.

And although the damaged party may have a right of action against the wrong doer, yet he has none on the bond or against the securities. The bond is personal to the government; if it pays for mis- or malfeasance, then a right of action occurs.

The moral consideration moving between her and the injured party is a sufficient consideration in good morals to justify the government in the payment to the injured party, the faithful and legal discharge of his duties to all concerned being the consideration of the bond.

It may be claimed, that some of the instances cited were cases where the officer sought to be reimbursed money which he either had paid or was by judgment liable to pay, under actions brought against him, as an officer of the government, for illegal or wrongful acts as the representative thereof.

This presents a stronger reason why the government should protect its citizen or the damaged party, for surely the wrong-doer or the one acting illegally stands in a worse attitude, and less to be protected by reimbursement, than he who has suffered the wrong and the victim of the illegal and wrongful acts of the government's representative.

But there is a case in which the injured party, as in this, applied to Congress directly, without testing any remedy or right against the wrong and illegal acts of its officers personally. It is the case of John O. Sullivan, whose vessel was seized by John M. Forbes, the commercial and political agent of the United States at Buenos Ayres. Application, as in this case, was made to Congress for compensation to the owner. The Senate, as will appear, applied to Mr. Woodbury, Secretary of the Treasury, for information touching the liability of the government for the acts of its agent, Forbes. Mr. Woodbury, after laying down the general rule as to the non-liability of the government for the illegal or wrongful acts of its officers, says, among other things:

The liability of the government extends only to such acts as arise from gross negligence in the discharge of its duties or omissions to perform them, and even in those cases the person suffering should either resort to the agent early, and in a suit with him establish his liability and the amount of damage, or resort only to the government, and make out a very clear case, so that redress might be had by the government on his personal responsibility on his official bond and security, if any exist.

This report can be found in Doc. No. 5, Twenty-third Congress, second session. An act of Congress was introduced and passed, 2d July, 1836, providing for compensation. This case, when examined, will be found in all essentials to be like the one we are considering, but nothing like as clear and strong or timely pressed. Also the following cases are referred to:

*Be it enacted, &c.,* That the Secretary of the Treasury be, and he is hereby, directed to refund to Thomas Harris Hodges, administrator of John H. Hodges, in behalf of the owners of the ship Herald, Captain Pullen, of Baltimore, out of any moneys in the Treasury not otherwise appropriated, the *extra* tonnage duty charged upon that ship by the collector of the port of New York on her arrival from Amsterdam in September, 1844, for a violation of the 6th section of the navigation act of the 1st March, 1817: *Provided*, That the said Hodges shall satisfy the Secretary of the Treasury that he is legally entitled to receive the same, and that the violation of the navigation act aforesaid was rendered necessary to enable the master to return with his vessel to the United States. Approved August 8, 1846. (See Stat. at Large, vol. 9, p. 664.)

Also :

*Be it enacted, &c.,* That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay out of any moneys in the Treasury not otherwise appropriated, to the legal representatives of William Bunce, deceased, \$1,000, they giving a receipt in full for the damage sustained by the deceased aforesaid in the burning of his buildings on Palm Island, Florida, by the order of Brigadier-General Armistead, of the United States Army. Approved March 3, 1847. (See Stat. at Large, vol. 9, p. 703.)

Also :

*Be it enacted, &c.,* That the Secretary of the Treasury be, and he is hereby authorized and directed to pay to the owners of the bark Attica, of Portland, Maine, out of any moneys in the Treasury not otherwise appropriated, the sum of \$174.62, being the amount imposed on said vessel as tonnage duty by the collector of New York in the year of our Lord 1855. Approved April 19, 1858. (See Stat. at Large, vol. 11, p. 528.)

Also :

*Be it enacted, &c.,* That the Secretary of the Treasury be, and he is hereby, directed to pay out of any moneys in the Treasury not otherwise appropriated, to Henry Rice, the sum of \$10,539.88, being a repayment to him of that sum paid by him into the Treasury of the United States as and for duties upon goods imported into Castine while in of the British forces, the same not being by law subject to the payment of duty, under the decision of the Supreme Court of the United States. Approved March 2, 1861. (See Stat. at Large, vol. 12, p. 890.)

Also :

*Be it enacted, &c.,* That there be paid out of any money in the Treasury not otherwise appropriated, to the order of the proper functionary of Her Britannic Majesty's Government, the sum of \$1,000, in full compensation to the owner of the British ship Perthshire, in consequence of her detention by the United States steamer Massachusetts, in June last, under the impression that she had unlawfully evaded the blockade of the port of Mobile. Approved January 17, 1862. (See Stat. at Large, vol. 12, p. 901.)

Also :

*Be it enacted, &c.,* That the Secretary of the Treasury be, and he is hereby, authorized and directed, out of any moneys in the Treasury not otherwise appropriated, to make the proper payment to carry into effect the decree of the district court of the United States for the southern district of New York, bearing date the 2d day of March, 1868, in the case of the English schooner Sibyl and her cargo, illegally seized by a cruiser of the United States; such payment to be made as follows :

To the several persons named in the said decree, or their legal representatives, the sums therein awarded to them respectively, with interest from the date of the decree. Approved July 8, 1870. (See Stat. at Large, vol. 16, p. 650.)

Also :

*Be it enacted, &c.,* That the Secretary of the Treasury be, and he is hereby, authorized and directed, out of any money in the Treasury not otherwise appropriated, to make the proper payments to carry into effect the decrees of the district court of the United States for the district of Louisiana, bearing date the 4th June, 1867, in the case of the British brig Volant and her cargo; also another decree of the same court, bearing date the 11th of June, in the same year, in the case of the British bark Science and cargo, vessels illegally seized by a cruiser of the United States; such payments to be made to persons named in said decrees, &c., with interest from date of decree, &c. Approved July 8, 1870. (See Stat. at Large, vol. 16, p. 650.)

But it is urged by some of the committee in the majority, that because it is so clearly and so strongly shown the entire want of authority to seize the bark Mary Teresa and cargo, the government is not bound; that in doubtful cases of authority the government would compensate the owner, but if it be a strong case, and as clear as "open and

shut," it should *refuse* payment. The only answer to this is Mr. Buchanan and Mr. Woodbury, and the rule for allowance is just the reverse. They say it must be clear—free of doubt and strong. The rule in equity is, to be in *doubt* is to be resolved, *not allowed*; to be clear and strong is to be *allowed*. All lawyers recognize this rule, and those who are not lawyers professionally, but equally well qualified to apply the rule from common sense, reason, justice, and equity—that plainer the case, greater the reason for its allowance.

Now as regards the reimbursing its officers, it should do so, if, with proper and reasonable skill and diligence, they err in the discharge of their official duties, and in all clear cases compensate the injured party; but while this may be right and true, it does not exclude the other mode of redress.

As regards the view that Leef, the injured man in this case, should have sought compensation against Tyler, the consul and officer, he could not in fact, as the evidence shows, do so. Tyler was in Bahia, in the employment and under the protection of the government, and acting for and in behalf of the government—a point out of the country and government, and remote from Baltimore, the home of Leef—requiring time and money, and far beyond the power of Leef, and without power or authority to control or direct him, and without bonds to indemnify him, while on the other hand he was agent of the government, subject to the orders of the government to remain or return as ordered, with bond and security to indemnify itself. And so it was when the Mary Teresa was seized. Tyler did it under the garb and prestige of the government; and so it was when he hauled down her flag, and with government at his back took possession of the property of a fellow-citizen who was relying upon the same government to protect, preserve, and defend his vessel, crew, and cargo. They dared not raise their hands; they had to submit; and thus the vessel was anchored, and super-cargo, captain, crew, and cargo were *unhorsed* by the government's officer in a foreign port, without friends or means of protection or defense, and turned loose without money in a foreign land, and this done by their own government by and through its own officer and representative, without a protest, and in open violation of all right, law, and humanity, and all of which, if successful, would have resulted for the benefit of the government; for if the vessel and cargo had been confiscated, the proceeds would have gone into the Treasury of the United States.

But it is contended by some of the committee that Leef should have sued Tyler any way. Why so? Mr. Woodbury did not so construe the rule of allowance. He said the injured party can do either; and he says all the rule requires is to proceed promptly, whether against the one or the other. It is too clear to admit of rational or fair debate, that Leef could not sue either Tyler or his securities, for the reason that Tyler was beyond his reach, and placed beyond his reach by the government, too, and he could not maintain a suit against the securities on official bond, for want of being a party thereto. That was for the government to do, and which it could do, but did not and would not do. The only use of the judgment, ordinarily, is to adjudicate, ascertain, and settle rights and the amount of the claim, so the government may pay the injured party, or indemnify and save harmless the erring officer. To have required Leef to have brought suit against Tyler would be but inflicting upon him further expense, labor, and loss, for a return of *nulla bona* against Tyler would have subjected him (Leef) to payment of the costs superinduced by him, and if in a foreign country the necessity, risk, and doubt of

giving security for costs before suit, which he might not and most likely could not have given, while the government was left free to act. Not only this, but in the case a suit would have been but a laborious, expensive act of supererogation at most. The case is too clear to admit of doubt, that if suit had been instituted it would have resulted in a judgment against Tyler and in favor of Leef; and such being true, then the case, in all fairness, should be treated without that objection, if an objection it could be.

The minority of the committee hold that the true rule in this and in like cases should be the rule well recognized in all courts of equity, viz, that in cases when one of two innocent parties must suffer, then that party must suffer who or by whose act the injury is brought on. Here the government selected and put this man Tyler, unintentionally even, upon Leef, and its officer does the wrong without its consent; then under this rule the government must suffer. But the still higher rule, resting for its support upon its great duty as a government to take care, preserve, protect, secure, and in a proper case mend up, repair, make whole its citizen broken up and family brought to want through the wrongful act of its agent.

The memorialist had complied with all the rules and regulations of this government before he purchased or cleared for the "*ill port of Bahia.*" After close inquiry, the vessel was bought, refitted, supercargued, captained, crewed, and cargued in the United States, at Baltimore, with the knowledge and consent of the government officers; left the port of Baltimore with the consent of foreign consuls to the country to which she was bound and navigated; touched at Richmond with like approval; reached Pernambuco, and there received by home and foreign consuls; left, and when reaching the port of Bahia, on the 21st November, 1847, seized by his own government officials; there and at other places exposed and detained, sale of vessel prevented, furniture and cargo injured, crew and agent exposed and forced off bark; and all this and more.

The vessel, after much exposure and long detention, was sent to the Port of Rio de Janeiro. There the consul and minister pronounced her papers good, and that he, Tyler, was in the wrong touching the premises. Then he (Tyler) corresponded with his government; they at once disapproved and disavowed his acts, and finally turned the damaged vessel over to its owners; and all these disavowels and approvals upon a mere inspection of the navigating papers of the *Mary Teresa*.

These are some of the facts in this case which justify the conclusion—the clearness of the rights of the vessel and the wrongs done her. The Secretaries of State and Treasury do not hesitate to say there was no violation of any law of the *United States* in Leef thus navigating the *Mary Teresa* under such circumstances. And if no law was violated in thus using the flag and not registering, thus it was lawful to so use and navigate said flag and without register.

To turn the party injured over to the wrongdoer alone in such case is but to encourage personal conflicts in the defense of his personal rights, as is prominently shown in part of the correspondence between Consul Tyler and Minister Tod, where he, Tyler, says that he had been threatened to be ignominiously treated and killed by (it is to be inferred) the supercargo or crew, and that he had to defend himself with pistol, &c. Such has been and will be the consequence if the government withholds from the injured party governmental indemnity and responsibility for the wrongful acts of its own officers and agents. The commerce of the country will inevitably be crippled when it is known, as it certainly



will be, that the government will neither control nor answer, in plain, strong, and clearly-established cases, for wrongs done by its own officers and agents.

It is believed by the minority that a safe, secure, and reliable commerce of the country can only be obtained and perpetuated by affording to those engaged in it an *assurance* that the government will, in a proper case, indemnify those who have depended and relied upon its flag and in a generous confidence of protection in their government, especially against the wrongs and abuses by its own officers and agents; for without this confidence, based upon a moral obligation, who would be so silly as to engage in that character of trade, although so valuable to the maintenance and support of the government?

The government cannot afford to be indifferent or refuse in such cases, if it were disposed, for the reason that the losses consequent upon such a course would be far greater than the amount required to be paid for the misconduct of its officers and agents. If a wrong of the character done to Leef, vessel, crew, and cargo had been inflicted by Tyler upon a foreign vessel, and reparation had been demanded by that country, we cannot doubt but that this government would have felt bound to have answered for the damage done; or if a consul of a foreign country had inflicted the injury upon Leef and vessel, this government would have required of that country compensation. The Geneva award, among other cases, could be cited, on the other hand, with many others, and the case of the owner of the British ship *Perthshire*, heretofore cited, and found in acts Statutes at Large, vol. 12, page 901, and others of like character. Then why not extend the same protection to its own citizens, done by its own officers and agents? Where is the difference in principle or in effect? None. The undersigned insist that as great or a greater reason exists; for, by refusal to do justice to its own, its own are deterred from such laudable enterprises and pursuits. Why not encourage them, especially its own, by sustaining confidence and create affection for its flag, feeling a sense of protection in his own government, which he not only respects, but serves and loves.

Why indemnify and compensate the subjects of foreign governments and turn against and upon its own, or withhold from its own that recompense which it has bestowed upon others? The facts of this case, in the absence of personal malignity, exhibit the grossest ignorance of a knowledge of navigating papers on the part of Mr. Tyler, the United States consul, representative and agent at the port of Bahia, Brazil; and gross ignorance is equal, certainly in its effects, to gross negligence, and the government should, in morals at least, be held responsible for the acts of its own officers and of its own choosing, when they are so grossly wanting in qualifications. It would improve in the matter of selecting and appointing officers and agents to impress those who appoint, consent, and confirm by requiring the government to pay for such representative acts, and thereby establish a better standard of fitness and qualifications for office by an exposure of such appointments, which could and would thus be seen and felt by the people, who are rightfully the sure and true checks upon either corrupt or ignorant action on the part of governmental officials, from the highest to the lowest.

It has been intimated by some of the committee that the time of the return of Mr. Tyler to the United States might have some bearing on this case as to the question of the disapproval of the government of his acts touching the *Mary Teresa*, and its liability in that respect, and the opportunity of Mr. Leef to have sued Tyler personally for the wrong done soon thereafter. To meet this inquiry and suggestion, while the minor-



ity accord to it no controlling importance, however, have ascertained the facts in reference thereto.

Upon inquiry of the State Department, the minority were furnished with a copy of the records of that department, which show that Mr. Tyler was retained in the consulate at Bahia from the 21st day of November, 1847, the day he seized the vessel Mary Teresa, until the 27th day of July, 1849, over twenty months after he had done the wrong to Leef, and the records, as far as we were advised, are entirely silent as regards any reprimand or complaint by the government further than heretofore stated, as concerns his conduct in the Mary Teresa seizure, &c.

The records show that the government became dissatisfied with Mr. Tyler, not for his treatment to the Mary Teresa, but because of his neglect and general disregard of instructions, without saying what or in what, but particularly for his failure to make any return or statement of the fees taken at his post, though repeatedly requested to do so; that he was superseded by Thomas Turner, esq., who took charge of the consulate about the 27th day of July, 1849. The records of the State Department do not show at what date he left Bahia or reached the United States, or that he returned at all, except that he was superseded by Mr. Turner, but supposed that he left Bahia about that time. A copy of said State Department records showing these facts, marked Q, is herewith filed and made a part hereof. So two things are not only shown, but to the minority established, by this part of the record: 1st. That notwithstanding the government admitted, when notified of the seizure and wrong done the Mary Teresa by the said Tyler, its consul, and disavowed his conduct in the premises, and admitted and declared that the conduct of the Mary Teresa violated no law of the United States, yet retained him in office for more than twenty months, and finally discharged him upon other grounds—practically keeping a man in office knowing his tortious acts to its citizens and the government, and to repeat, if opportunity presented, similar acts, and contenting itself with a mere disavowal of his acts. 2. The record shows he was absent from the United States nearly two years continuously following his treatment to the Mary Teresa, resulting to the great injury of Leef and others, and establishes the fact of his continued non-residence, and at the instance and recognition of the United States, and subject to its orders and control, and entirely beyond the reach and without the control of Mr. Leef; and if Leef had delayed any steps against the government, he would have been met with and incurred the just objection that he had delayed, as against the government, too long (two years), and under the rule laid down by Mr. Woodbury, which was and is prompt action and reasonable in itself, his claim would have been rejected for the want of it, and no doubt would have been urged by those who now say he should have waited for Tyler's return.

The value of the vessel by a commission selected by Mr. Tyler as consul himself was \$15,000. The other damages claimed by the memorialist extended it to over twenty-five thousand dollars. The amount estimated by the supercargo was thirty thousand dollars to all concerned, but in the progress of the incomplete legislation on this subject the claim of John McKee has been excluded, on the ground he must look personally to Leef for compensation, being in employ of Leef. The amount of the account of the owner was reduced by former committee to \$20,000, which by the owners' consent, as shown in their last memorial, they have agreed to receive.

The diligence used by Mr. Leef in this case, as shown by some of his memorials, as well as the journals of Congress, was commenced as early as

the 6th July, 1848, within sixty days after return of vessel, and has been reasonably pursued ever since.

Henry Leef died in the year 1860; up to that time he pressed his claim. Then followed the war between the States; after that the claim was urged by the widow and children through agents, some of whom, it is stated, were somewhat neglectful, but the best a widow and children could be expected to do. The case has received as many as *seven favorable* reports by as *many different* committees, all of which are in the papers and here referred to; which is persuasive at least to show the correctness of the claim and the propriety of its allowance. It does not appear that any committee reported adversely thereto, or that the bill ever was defeated by Congress, but only failed to come to a final vote in consequence of the vicissitudes of legislation, and which was in no wise attributable to the negligence of the memorialist. That the government has been the recipient of the long-delayed allowance of a just claim, and correspondingly a loss to the memorialist; the use in the shape of simple interest would have trebled the amount mentioned in the bill.

In two or more of the cases referred to in Mr. Eustis's report, not only the damages and losses were paid, but costs and interest.

Under the facts of this case, the minority insist the committee should have reported favorably to the claim of Mrs. Juliet Leef and children, and found the amount to be due them \$20,000, and reported a bill for that amount and recommended its passage.

LUKE PRYOR.  
ISHAM G. HARRIS.  
JAMES B. GROOME.

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